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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 820

10 EAST 40TH STREET BUILDING, INC.,

Petitioner,

against

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE, ALFRED BREGLIA, JOSEPH BARBARA, GERALD KERR, PETER OHAN, ANGELO MICALLEF, FRANK VOSCINAR, WILLIAM DE TROY, JOHN MICHALICKA, ISADORE MIKA, JACOB VARTABEDIAN, LAURENCE ZAMMIT, JULIUS OROSZ, CHARLES BONNICI, BENJAMIN C. HARRIS, DENNIS SHEA, ALFONSO CHIVELLY, THOMAS CALLAHAN, FRANK LANGE, FRANK COLANGELO, SALVATORE FIORENZA, JOSEPH SPITERI, WALLY SPITERI, AZIZ KASSABIAN, ALBERT VOGEL, PAUL CHAMBERS, SAMUEL MITCHELL, PETER MACREDI, ELIA VECCHIONE, MICHAEL ADDEA, MICHAEL DE TROY, JOSEPH S. RAYZAK, HERBERT B. MCCLELLAND, THOMAS ROSSO, GAETANO GRECK, JOHN I. ORTIZ, GILBERT ORTIZ, PASQUALE A. SAGGESE, EDWARD KILLIAN, JAMES H. LAW, GEORGE OROSZ, SALVADOR SANCHEZ, ROBERT MURDEN, JOHN P. SMYTH, FRED KASSAB, JOSEPH CEFAI, JOSEPH HERRERA, EMIL J. CISEK; and CHARLES G. BORG, suing in behalf of themselves and all other employees and former employees of defendants similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

JOSEPH M. PROSKAUER,
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Opinions Below

The opinion of the Circuit Court of Appeals (R. 339-343 *) is reported in 146 F. 2d 438. The opinion of District Judge Murray Hulbert (R. 312-321) is reported in 51 F. Supp. 528.

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* References are to pages in the Transcript of Record as reprinted for this court.

Jurisdiction

The opinion of the Circuit Court of Appeals was handed down November 13, 1944 (R. 339) and its judgment was entered on December 27, 1944 (R. 345). The petition for certiorari herein was filed January 6, 1945 and was granted February 12, 1945 (R. 346). The jurisdiction of the court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347).

Questions Presented in This Case and in *The Borden Company* v. *Borella*, No. 688

This court has directed that this case be heard with No. 688 (346).

In both cases the Second Circuit Court of Appeals rejected the conclusion reached in the other circuits that maintenance employees of *office* buildings are not covered by the Fair Labor Standards Act.

In both cases said court held, at variance with other circuits, that administrative and financial activities, conferences, keeping of records and conducting correspondence constitute production of goods for commerce, where the company carrying on such activities is *elsewhere* engaged in the actual production of goods.

In both cases the work of maintenance employees of office buildings has been held "necessary to the production" of goods by reason of the fact that occupants of the building were held to be engaged in activities "necessary" to actual production in distant places.

In both cases the Second Circuit Court of Appeals has completely disregarded this court's definitions of "necessary to the production of goods for commerce" and has

failed to heed its admonition that, in interpreting the Fair Labor Standards Act, lines must be drawn so as to give effect to the legislative intention *as expressed in the Act* and that, in these cases, the courts should not indulge in "judicial legislation" (*Kirschbaum* v. *Walling*, 316 U. S. 517; *Western Union Telegraph Co.* v. *Lenroot*, U. S. , 89 L. ed. 289, decided January 8, 1945).

Both cases illustrate the *reductio ad absurdum* argument of an endless chain of employees "necessary" for production apprehended by Mr. Justice Roberts in his dissenting opinion in *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, and wholly disregard the way this was met in *Kirschbaum* v. *Walling*, supra, where this court stated that "lines are to be drawn" by "the gradual process of inclusion and exclusion".

Differences between the *Borden* case and the case at bar

In this case the Second Circuit extended its previous ruling in No. 688 so as to make the Act apply to maintenance workers of practically all multi-tenanted office buildings.

The Borden decision was based on two factors not present in this case:

1. The Borden Company, a manufacturer of milk products, itself owned and occupied 58% of the rentable area of the building and was the employer of the respondents in that case, which facts, the Circuit Court held, brought the workers

> "nearer to 'production' than were the employees in A. B. Kirschbaum v. Walling, Administrator, supra, 316 U. S. 517 * * *" (145 F. 2d 63, 65).

2. Stressed also was the fact that from its offices in the Borden Building the entire manufacturing business of the owner was supervised, managed and controlled.

In this case the owner of the building is engaged solely in the management and operation of an office building. It is not a manufacturer and does not use any of the space in its office building except in connection with the management of said building.

The Circuit Court of Appeals did not find—and the undisputed evidence in the case would not support a finding—that there was any substantial use of the offices in the building herein in directing the production of any goods anywhere.

In the case at bar the holding of the court below was based upon the fact that more than 20% of the building was occupied by sales and executive offices of manufacturing and mining concerns and sales agents of said firms.

In order to arrive at the 20% degree of occupancy—used as the test of substantiality—the Circuit Court had to and did hold that sales offices and sales agencies are producers of goods for commerce. This, on the theory that selling constitutes "handling" and that sales contracts bring about transportation of goods in commerce and, therefore, are "necessary" to "transporting" within the meaning of the Fair Labor Standards Act.

Statement of the Case

The Circuit Court of Appeals for the Second Circuit has held that respondents, elevator operators, porters, watchmen and other maintenance employees (R. 309-312) employed by the petitioner in its office building at 10 East 40th Street, in the City of New York, were engaged in the production of goods for commerce within the meaning of Section 7(a) of the Fair Labor Standards Act of 1938 [29 U. S. C., Sec. 207(a)] essentially because more than 20% of said office building was occupied by sales and executive offices of tenants elsewhere engaged in manufac-

turing or by sales agencies of such companies and, therefore, were entitled to overtime compensation, liquidated damages and counsel fees under said Act (R. 339).

The Circuit Court of Appeals made that ruling in reversing a judgment of the United States District Court for the Southern District of New York, which dismissed respondents' complaint on the merits (R. 333).

Nature of building's occupancy

The facts are not in dispute.

Petitioner, a New York corporation, owns a multi-tenanted forty-eight-story and basement office building at 10 East 40th Street in New York City. Its business consists of the management and operation of and rental of space in said building, where respondents are employed as maintenance workers (R. 307-312).

The building may be fairly described as a typical metropolitan office building.

It is undisputed, and the trial court found, that there was "no manufacturing of any kind carried on in the office building" (R. 316). The trial court also made, and the Circuit Court of Appeals did not reverse, the finding that the amount of space utilized in the building

> "in connection with the publicity and advertising prepared in or outside of the building * * * in relation to the entire volume of business transacted and carried on by the tenants at and from said premises is not substantial" (R. 316).

During the period covered by the complaint there were in all 111 tenants who occupied 89% of the rentable area of the office building herein (R. 313).

The Circuit Court of Appeals summarized the occupancy of the building as follows:

> "(1) Executive and sales offices of twenty concerns carrying on elsewhere the business of manufacturing and mining. The offices are used for executive and administrative activities, for conferences and for taking orders for substantial quantities of merchandise of considerable value manufactured and shipped, from factories and mines elsewhere located, to customers in several states.
>
> "(2) Offices of sales agencies representing seventeen manufacturers and mining concerns carrying on elsewhere the business of manufacturing and mining. The offices in the building are used to sell a variety of the products of the company they represent. As a result of the efforts of these agencies substantial amounts of merchandise of considerable value are shipped across state lines from factories, mines, and warehouses, elsewhere located in various parts of the country.
>
> "(3) Twenty-four lawyers and law firms carrying on the usual activities incident to the practice of law.
>
> "(4) The United States Employment Service which places white-collar workers in various factories and business houses.
>
> "(5) Advertising agents and publicity and trade organizations* which carry on publicity and advertising work using national publications, newspapers and radio. One publishing firm† is included in this group. Its business here consists of the purchase and receipt of scripts, the examination and correction of the same and the regular business and financial activities of the firm. The officers and employees of the trade organiza-

* The total space occupied by this group is 15,520 sq. ft. 9,010 sq. ft. is occupied by two public relations counsel (R. 83, 89-95); 875 sq. ft. by an advertising agency (R. 103, 105-106); 215 sq. ft. by a commercial artist (R. 202-205) and the remaining 13,520 sq. ft. by trade organizations whose principal function is to gather and disseminate trade information (R. 134, 136-137, 292-295, 244-245, 260-264, 189-192).

† This tenant, Standard Magazines, is included among the executive offices in class 1.

tion or principally engaged in research and correspondence incidental to their operations. They also prepare circulars and in some cases weekly or monthly publications which are elsewhere printed and in most cases distributed from places other than the building herein.

"(6) Engineering and construction firms which carry on their correspondence and executive and administrative activities from the offices in this building.

"(7) Investment, financing and credit organizations which use their offices for their executive and administrative work. The investments, financing and credit work is done in connection with businesses and projects located in various parts of the country.

"(8) Offices of import and export firms which make arrangements for export and import of a variety of goods of substantial value.

"(9) Miscellaneous tenants including dentists, charitable organizations, etc., whose activities are not interstate in character" (R. 340-341).

Making contracts for the sale of goods held to constitute production of goods for commerce

Rejecting respondents' contention that they were covered by the Act because they were "engaged in commerce" (R. 342), the Circuit Court held that tenants were, nevertheless, engaged in activities "necessary to the production of goods for commerce" and that therefore respondents were "necessary" to such production within the meaning of the Fair Labor Standards Act. In doing so the court considered the space occupied by said group of tenancies, holding:

1. "That the investment, finance and credit organizations, the engineering and construction firms, as well as the lawyers, the United States Employment Service and the miscellaneous tenants described above are not engaged in the production of goods for commerce. These tenants

occupy about 44% of the available space and 49% of the rented part of the building."

"2. That the executive and sales offices of manufacturing and mining concerns in class (1), which occupy 26% of the rentable area and 29% of the rented space in the building, were engaged in production.

[Ten of the twenty offices, using approximately half the total space occupied by this class (60,470 sq. ft.) were purely sales offices.* United Feldspar Co., a mining company, maintained an office (980 sq. ft.) for letter-writing purposes only (R. 248-251), Eastman Kodak Co. (4,450 sq. ft.) for publicity work (R. 69), Beechnut Packing Co. (2,690 sq. ft.) for convenience in conferring with advertising agencies, publishers and radio stations in New York City (R. 101-102) and Cluett, Peabody & Co. (10,010 sq. ft.) for purchasing materials, selling neckwear and arranging advertising (R. 234-238). None of these fourteen offices, occupying 48,050 sq. ft. of the total of 60,470 sq. ft. for the whole class, or 79.4% thereof, had anything to do with actual production. The remaining six tenants occupy approximately 5.1% of the rentable area of the building.]

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* Manufacturing companies using offices as sales offices only:

	Space	
Ames Bag Machine Co.	300	sq. ft. (R. 228)
Blackinton & Co.	980	" " (R. 193)
Chase Brass & Copper Co.	12,155	" " (R. 195-197)
J. H. Dunning Corp.	1,110	" " (R. 161-164)
Thomas A. Edison Co., Inc.	2,500	" " (R. 111-112)
General Motors Cleveland Diesel Engine Division	2,140	" " (R. 61-62)
Perolin Company of New York	1,990	" " (R. 209-210)
Tennessee Eastman Corp.	920	" " (R. 64)
Vanity Fair Mills	6,415	" " (R. 165)
S. S. White Dental Mfg. Co.	1,510	" " (R. 175)
	30,020	

3. That the publicity concerns occupying 6.5% of the rentable area and 7.5% of the rented area were likewise engaged in production.

4. That sales agencies representing mining and manufacturing concerns, which occupy 9.5% of the available area and 10.5% of the rented area, were engaged in production because the contracts procured by them caused goods to be transported and they were thus "'necessary' to the 'transporting'", that sales agents "may be considered as engaging in 'handling' the goods by arranging their transfer from one person to another" and that selling is "economically necessary" to production (R. 341-343).

The Circuit Court adopted 20% as the measure of substantiality (R. 342). Based upon that test, tenants occupying a substantial amount of space were found to be engaged in activities thus held to be "necessary" to the production of goods.

Without considering the relationship between respondents' maintenance activities and those of the tenants, said court held that because the tenants' activities were necessary to production, respondents' activities being necessary to the tenants, they were likewise engaged in production. In reaching such conclusion the Circuit Court of Appeals stated that other Circuits

> "which reached a contrary view seem to have rejected the rationale to which we committed ourselves in the *Borella* case (No. 688) and to which we shall adhere here" (R. 343).

Since the publicity concerns occupy a very small fraction of the space in the building and since the great majority of the other tenants, held to be producers, use their offices as sales offices (of manufacturing companies or of agencies representing them), the chief questions for determination herein are whether selling constitutes "produc-

tion of goods for commerce" and whether maintenance workers are "necessary" to such "production".

Relevant Provisions of Statute Involved

Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Secs. 201-219).

"Sec. 3. As used in this Act—

* * * * * * *

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof" [29 U. S. C., Sec. 203(b)].

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof" [29 U. S. C., Sec. 203(i)].

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State" [29 U. S. C., Sec. 203(j)].

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed" [29 U. S. C., Sec. 207(a)].

Section 16(b):

"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action" [29 U. S. C., Sec. 216(b)].

Specification of Errors

The Circuit Court of Appeals erred in holding

(1) that administrative activities in offices of companies elsewhere engaged in manufacturing and mining constitute "production of goods for commerce" within the meaning of the Fair Labor Standards Act;

(2) that selling goods constitutes "production of goods for commerce" within the meaning of said Act;

(3) that offices of an advertising agency, public relations counsel and trade organizations are producers of goods;

(4) that maintenance employees of this office building whose work may be "necessary" to its tenants, whose

activities in turn are necessary to the activities of still others engaged—in distant places—in the actual production of goods, are themselves engaged in the "production of goods for commerce" within the meaning of said Act;

(5) that the work of maintenance workers of this office building had a sufficiently close tie with the activities of the tenants' office employees as to make such maintenance work "necessary" to "production" within the meaning of said Act;

(6) that 20% is a proper test of substantiality in determining whether an office building is devoted to production;

(7) that respondents were engaged in the production of goods for commerce within the meaning of said Act.

Outline of Argument

This court's decision in *McLeod* v. *Threlkeld*, 319 U. S. 491, has made it clear, as found by the court below, that respondents were not "engaged in commerce" within the meaning of the Fair Labor Standards Act.

Since respondents concededly did no "producing, manufacturing, mining, handling, (or) transporting * * *" of goods, the sole question is whether they were engaged in an "occupation necessary to the production thereof".

Petitioner claims that they were not so engaged because:

1. The courts, federal and state, with the exception of the Second Circuit Court of Appeals, have uniformly and correctly differentiated between the work of maintenance employees of factory buildings and those of multi-tenanted office buildings and this court, in seven cases, has left undisturbed their ruling that the work of office building service employees is not "necessary" to production.

2. The fact that some of the office tenants of the building herein were elsewhere engaged in manufacturing and

mining did not make the work of petitioner's maintenance employees "necessary" to such production in distant places.

3. The sales activities of manufacturing and mining companies and sales agencies whose offices were located in the building herein did not constitute "production of goods for commerce" and, therefore, the building service employees could not, by reason thereof, be held to be "necessary" to production within the meaning of said Act.

4. Employees of tenants working on publicity and advertising are not producers of goods for commerce. Even if they were, however, respondents in maintaining the building did not have a sufficiently close tie with such activities as to make them "necessary" thereto within the meaning of said Act.

5. The 20% test of substantiality adopted by the Circuit Court of Appeals is improper. However, even under such test, the building herein was not devoted to the production of goods for commerce.

POINT I

The courts, except for the Second Circuit Court of Appeals, have uniformly held and, in seven cases, this court has left undisturbed the ruling, that the work of maintenance employees of multi-tenanted office buildings—such as the one involved in this case—is not covered by the Fair Labor Standards Act.

Scores of cases involving office buildings were instituted following the decision in *Kirschbaum* v. *Walling*, 316 U. S. 517, in which this court held that maintenance employees of *loft* buildings "principally devoted" to the *manufacture of goods* for commerce were covered by said Act because their work

> "had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation necessary to the production of goods for commerce."

In reaching its conclusion in the *Kirschbaum* case this court made it clear, however, that Section 3(j) of the Act did not contemplate the inclusion of the work of an employee having "only the most tenuous relation to" the production of goods and that lines would have to be drawn by using "something of that common sense accommodation of judgment to kaleidoscopic situations".

Thereafter, when multi-tenanted office building cases reached the courts, they consistently and correctly distinguished the work of maintenance employees of office buildings from the work of factory-loft building employees, and held the former to be outside the purview of said Act.*

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* *Johnson, et al.* v. *Dallas Downtown Development Co.*, 132 F. 2d 287, CCA 5th, cert. den. 318 U. S. 790; *Stoike* v. *First National Bank of New York*, 290 N. Y. 195, cert. den. 320 U. S. 762, October 11, 1943; *Tate* v. *Empire Building Corp.*, 135 F. 2d 743, CCA 6th, cert. den. 320 U. S. 766, October 11, 1943; *Johnson* v. *Masonic Building Co.*, 138 F. 2d 817, CCA 5th, cert. den. 321 U. S. 780, February 28, 1944; *Rucker, et al.* v. *First National Bank of Miami, Okla.*, 138 F. 2d 699, CCA 10th, cert. den. 321 U. S. 769, January 31, 1944; *Rosenberg (Lorenzetti)* v. *Semaria*, 137 F. 2d 742, CCA 9th, cert. den. 320 U. S. 770, October 18, 1943; *Convey* v. *Omaha Nat. Bank*, 140 F. 2d 640, CCA 8th, cert. den. 321 U. S. 781, March 6, 1944; *Lofther* v. *First National Bank of Chicago*, 48 F. Supp. 692, aff'd CCA 7th, 138 F. 2d 299; *Patterson, et al.* v. *Memphis Cotton Exchange Realty Co., Inc.*, Tenn. Chancery Court, 6 WHR 308; *Brandell, et al.* v. *Continental Illinois National Bank Co.*, 43 F. Supp. 781; *Cochran* v. *Florida National Building Corp.*, 45 F. Supp. 830, aff'd CCA 5th, 134 F. 2d 615; *Building Service Employees Union, Local 238* v. *Trenton Trust Co.*, 53 F. Supp. 129, aff'd CCA 3rd, 142 F. 2d 257; *Baum* v. *A. C. Office Building Co.*, Kansas Sup. Ct., 6 WHR 1236, November 6, 1943; *Hinkle* v. *Frank Nelson Bldg.*, 7 WHR 689, Alabama Supreme Court; *Hinkler* v. *83 Maiden Lane Corporation*, D. C. N. Y., 50 F. Supp. 263; *Wideman* v. *Blanchard & Calhoun Realty Co.*, D. C. Ga., 50 F. Supp. 626; *Matter of Liquidation of N. Y. Title & Mort. Co.*, 179 Misc. 789; *Johnson* v. *Great Nat. Life Ins. Co.*, Tex. Civ. Ap., 166 S. W. 2d 935; *Johnson* v. *Filstow*, 43 F. Supp. 930, D. C. Fla.; *Belics* v. *Penn Bldg., Inc.*, Appellate Term, 1st Dept., 180 Misc. 1062, aff'd 267 App. Div. 955; *Cullen* v. *Stone & Webster Building, Inc.*, 7 WHR 147, D. C. N. Y., December 24, 1943; *Blumenthal* v. *Girard Trust Co.*, 141 F. 2d 849, CCA 3rd; *Baldwin* v. *Emigrant Ind. Sav. Bank, D. C. N. Y.*, 7 WHR 831; *Bozant* v. *Bank of New York*, 8 WHR 68 (not officially reported), U. S. D. C., S. D. N. Y.; *Greene* v. *Anchor Mills Co.*, 8 WHR 41 (not officially reported), North Carolina Supreme Court, December 14, 1944.

Seven applications for certiorari were made to this court in office building cases and in each one of them this court left undisturbed the holdings of the courts below that maintenance workers in those cases were not "engaged in commerce" or in work "necessary to the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

Johnson, et al. v. *Dallas Downtown Development Co.*, 132 F. 2d 287, CCA 5th, cert. den. 318 U. S. 790;

Stoike v. *First National Bank of New York*, 290 N. Y. 195, cert. den. 320 U. S. 762, October 11, 1943;

Tate v. *Empire Building Corp.*, 135 F. 2d 743, CCA 6th, cert. den. 320 U. S. 766, October 11, 1943;

Johnson v. *Masonic Building Co.*, D. C. Ga., 138 F. 2d 817, CCA 5th, cert. den. 321 U. S. 780, February 28, 1944;

Rucker, et al. v. *First National Bank of Miami, Okla.*, 138 F. 2d 699, CCA 10th, cert. den. 321 U. S. 769, January 31, 1944;

Rosenberg (*Lorenzetti*) v. *Semaria*, 137 F. 2d 742, CCA 9th, cert. den. 320 U. S. 770, October 18, 1943;

Convey v. *Omaha Nat. Bank*, 140 F. 2d 640, CCA 8th, cert. den. 324 U. S. 781; March 6, 1944.

This court observed in *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, that

> "* * * legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

"Ordinary" laymen have read the Fair Labor Standards Act to mean that an elevator operator of a multi-tenanted office building is not engaged in the production of goods for commerce.

This is not strange in view of the fact that upwards of 100 judges of federal and state courts have similarly interpreted the statute.

The explanation for the divergent views of the Second Circuit Court of Appeals may be found in the reasoning of its opinion in the *Borden Co.* case to which it expressly adhered in this case:

(a)

This court in *Western Union Telegraph Co.* v. *Lenroot*, U. S. , 89 L. ed. 289, pointed out:

> "But we take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done if the circumstances of this case had been put before it."

The Second Circuit refuses to follow this rule and says in the *Borden Co.* case:

> "We can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time" (p. 64 of 145 F. 2d).

(b)

This court in *Kirschbaum* v. *Walling*, supra, pointed out that where Congress adopted "a new scheme for Federal industrial regulation" it may not be assumed that "it thereby deals with all situations falling within the general mischief which gave rise to the legislation", particularly where the mischief is the concern of both state and federal governments.

The Second Circuit refuses to follow this, and says:

> "We can therefore see nothing in the language used which should limit the general purpose * * * and it appears to us that any hesitation to give that purpose

its full scope must proceed from a vague compunction that to press the statute so far, is unduly to invade fields which Congress must have meant to leave to local regulation. We do not share that compunction" (p. 65 of 145 F. 2d).

(c)

This court said in the *Kirschbaum* case:

"* * * when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation" (p. 522 of 316 U. S.).

The Circuit Court of Appeals refused to follow this and found it to be the court's function to carry out the purpose of the Act in "its full scope", unless deterred by limiting language in the Act itself.

This case illustrates the danger of such "retrospective expansion of meaning" indulged in by the Circuit Court. As found by the trial court:

"* * * the lowest paid individual plaintiff and the individual plaintiff working the longest number of hours per week were paid amounts in excess of what they would have received had they been paid the minimum wages for standard hours as provided by the Act and one and a half times such minimum hours worked in excess of such standard hours" (R. 317).

Had Congress made it clear that office building maintenance workers were to be covered by the Fair Labor Standards Act, their hours of employment might have been reduced prior to October 24, 1938, when the Act became effective, or agreements entered into, providing for a lower hourly wage with time and a half for hours worked in excess of the maximum hours provided by the Act. Compare *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624.

Instead, unless the decision of the Circuit Court of Appeals herein is reversed, the petitioner is required to pay overtime compensation, plus liquidated damages and counsel fees, because the court below, six years after the statute's enactment, expanded its meaning to include respondents on the theory that Congress, without having said so, would have desired their inclusion if the matter "had been presented to it" at the time the statute was drafted.

POINT II

The Circuit Court of Appeals erred in ruling that the maintenance employees of petitioner's office building were "necessary" to production by reason of the fact that some of the tenants in the building were elsewhere engaged in manufacturing and mining.

Of the twenty tenants making up class 1—the manufacturing and mining tenants—ten, occupying approximately half the space of the entire group, are engaged in purely sales activities. Four other tenants occupying approximately one-fifth of the total space for this group use their offices for carrying on correspondence and for conferences on advertising, publicity, purchasing materials and selling.

Only an infinitesimally small percentage—about 5.1% *—of the rentable space of the building herein is used for executive offices and there is no finding that any space is used for the direction of production elsewhere.

With one of the bases for the decision in the *Borden* case absent from this case—direction of production in distant places—the questions presented respecting this group of tenants are:

(1) whether office workers in an office building in New York may be said to be engaged in the production

* See p. 8, supra.

of goods for commerce because their employers are elsewhere engaged in manufacturing or mining; and

(2) whether an elevator operator or a porter may be held to be covered by the Act because his activities are necessary to office employees, whose work in turn bears this tenuous relationship to the manufacture or mining of goods in distant places.

The term "necessary" as used in Section 3(j) is not defined in the statute. However, this court has had occasion to define that term in the following cases: *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88; *Walton* v. *Southern Package Corp.*, 320 U. S. 540; *Armour & Co.* v. *Wantock*, 323 U. S. 126, decided December 4, 1944.

In the *Kirschbaum* case Mr. Justice Frankfurter defined work "necessary" to production to mean work having "a close and immediate tie with the process of production" and he stated further that where the work of an employee "has only the most tenuous relation to" the production of goods, such work is not to be considered "necessary" (p. 525 of 316 U. S.).

Similar definitions were employed in the other cases wherein those who dug wells were held engaged in the production of oil and watchmen and firemen employed to protect goods in the process of production were held to have a sufficiently close and direct relationship with actual production to make them "necessary" to such production.

We do not contend that in order for one's work to be "necessary" to production it must be indispensable (as claimed in *Armour* v. *Wantock*, supra) or that there must be physical contact with the goods produced, but that is a far cry from saying that an elevator operator who transports a stenographer to her office at 10 East 40th Street is a producer of automobiles because she works for the General Motors Company which produces automobiles in Detroit, Michigan.

But even if we assume *arguendo* that the employees of General Motors and the other manufacturing companies were engaged, at their offices at 10 East 40th Street, in activities necessary to their company's manufacturing elsewhere, that does not *ipso facto* make the elevator operator or the porter necessary to General Motors' production in Detroit.

As we see it, those who are necessary to the work of others, who, in turn, are necessary to the work of still others elsewhere engaged in actual production, are not themselves engaged in production. Those who are twice removed from production do not have a "close and immediate tie with" production.

If "necessary to the production" as used in the statute does not mean necessary to actual production there would be no end to the chain of producers. If elevator operators are producers of goods because they are necessary to administrative employees, salesmen or stenographers, who, in turn, may be necessary to manufacturing in another state, then those who transport the elevator operators and porters to their work would likewise be necessary to production.

Other Circuit Courts have met the problem here presented by "drawing lines" and following definitions laid down by this court in the *Kirschbaum* and later cases.

Thus, in *Johnson* v. *Masonic Bldg. Co.*, 138 F. 2d 817, cert. den. 321 U. S. 780, there were a number of tenants who produced goods outside of their offices in the building involved in that case. Referring to such occupancy the Fifth Circuit Court said:

> "The building employees are not doing anything that is necessary to or even directly contributes to such production. The case is not like *Kirschbaum* v. *Walling*, 316 U. S. 517 [5 WHR 442], where the building was devoted to the production of such goods. If the office

men of Merry Bros. Brick and Tile Company and Southeastern Bituminous Company can be said to be producers of goods, the appellants, employed by another employer with no especial reference to the business of any tenant, cannot be held to be so engaged because these tenants were producing goods elsewhere."

In *Rucker* v. *First National Bank of Miami*, 138 F. 2d 699, CCA 10th, cert. den. 321 U. S. 769, the court found that the building therein was occupied by executive and administrative offices of a mining and smelting company, the executive offices of a railroad company, the office of the company engaged in selling chat and crushed rock, an abstract company, the sales office of an extension university, sales office of DuPont Co., brokers, etc.

Referring to this type of occupancy the court said:

"Specifically, we are urged to hold that these employees, as elevator operators, were engaged in the production of goods for commerce on the authority of Kirschbaum Co. v. Walling, supra.

* * * * * * *

"But the facts before us which bear upon the phrase 'production of goods for commerce' are only remotely analogous to the facts in the *Kirschbaum* case. The executive and administrative offices of the mining and smelting company were located in the building serviced by the elevator operators; and this company was doubtless engaged in the production of goods for commerce, but it is not shown on this record whether any of the goods were produced in the building, or that any of the employees transported to and from the offices are directly or indirectly engaged in the production of the goods. The same is true of the chat and crushed rock company; and the abstract company, which produced abstracts, some of which were shipped in interstate commerce. *In any event, the relationship is not shown to be 'close and immediate'.* Under these facts it cannot be said that the activities of the elevator operators were an essential part of, or necessary to, the production of goods for commerce" (at p. 702). (Italics ours.)

In *Greene* v. *Anchor Mills Co.*, 8 WHR 41 (not officially reported), North Carolina Supreme Court, December 14, 1944, building service employees of an office building were held not to be covered by the Act, although their employer occupied part of the building and from there directed the activities of its mills, elsewhere located, and despite the further fact that fourteen offices in the building were occupied by ten manufacturing firms elsewhere engaged in manufacturing.

These courts, it is submitted, have correctly applied the definitions found in the Act and have followed the directions of this court in using "that common sense accommodation of judgment of kaleidoscopic situations". *Kirschbaum* v. *Walling*, supra.

POINT III

Sales activities of tenants elsewhere engaged in manufacturing and mining or of sales agencies representing such companies do not constitute production of goods for commerce within the meaning of the Fair Labor Standards Act.

As already indicated, no substantial amount of space was occupied in the building herein for executive offices. Half the manufacturing and mining tenants (occupying approximately half the total space of this class of tenants) used their space solely for sales offices. It follows that the real question in this case is whether elevator operators, porters *et al.* who serve those who make contracts for the sale of goods in sales offices of manufacturing and mining companies or their sales representatives are engaged in the production of goods as defined by the Fair Labor Standards Act.

The Circuit Court held that they are, saying:

> "The Act covers 'goods' until 'their delivery into the actual physical possession of the ultimate consumer'.

Section 3(i) [29 U. S. C. A. §203(i)]. And 'production' is defined to include 'handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof'. Section 3(j) [29 U. S. C. A. §203(j)]. Thus, transportation of goods until their delivery to the ultimate consumer is 'production' as defined by the statute. A sales agent who procures the contracts in performance of which the goods are 'transported' is therefore engaged in the production of goods for commerce, since he is 'necessary' to the 'transporting'.

* * * * * * *

"Moreover, sales agents may be considered as engaged in 'handling' the goods by arranging their transfer from one person to another" (R. 342-343).

That the foregoing reasoning is fallacious has since been determined by this court's reversal of the Second Circuit's earlier decision in *Western Union* v. *Lenroot*, —U. S. , 89 L. ed. 289, decided January 8, 1945.

In that case this court rejected the contention that one is engaged in production if he "handles" goods unless the handling takes place in connection with the "making of an article ready to enter interstate transit":

"The Government contends that in defining 'produced' the statute intends 'handled' or 'worked on' to mean not only handling or working on in relation to producing or making an article ready to enter interstate transit, but also includes the handling or working on which accomplishes the interstate transit or movement in commerce itself. If this construction is adopted, every transporter, transmitter, or mover in interstate commerce is a 'producer' of any goods he carries. But the statute, while defining 'produced' to mean 'handled' or 'worked on' has not defined 'handled' or 'worked on'. These are terms of ordinary speech and mean what they mean in ordinary intercourse in this context. They serve a useful purpose when read to relate to all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce. One who packages a product or

bottles a liquid, or labels, or performs any number of tasks incidental to preparing for shipment might otherwise escape the Act, for in a sense he neither manufactures, produces, or mines the goods. We are clear that 'handled' or 'worked on' includes every kind of incidental operation preparatory to putting goods into the stream of commerce."

This court, in the same case, also held that one who is engaged in transporting goods after their completion is not engaged in production:

"If we go beyond this (the inclusion of 'every kind of incidental operation preparatory to putting goods into the stream of commerce') and assume that handling for transit purposes is handling in production, we encounter results which we think Congress could not have intended. * * * Section 15(a) makes it unlawful to transport or ship goods in the production of which any employee was employed in violation of the wage and hour provisions. But it makes this exception: 'except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods *not produced by such common carrier.*' (Italics supplied.) This recognizes a distinction between handling in transportation and producing, which is entirely put to naught by the Government's contention that by definition everyone who handles goods in carriage is thereby made a producer. The exception then is as if it read 'the Act shall impose no liability on a common carrier for carrying goods that it does not carry'. One would not readily impute such an absurdity to Congress; nor can we assume, contrary to the statute, that 'produced' means one thing in one section and something else in another. To construe those words to mean that handling in carriage or transmission in commerce makes one a producer makes one of these results inevitable. Congress, we think, did not intend to obliterate all distinction between production and transportation."

In his dissenting opinion in the *Western Union* case, Mr. Justice Murphy makes it clear that the minority and

majority of this court disagreed, primarily, on the application of the rule to the particular facts in the *Western Union* case:

> "Contrary to the view expressed in the majority opinion, the government does not ground its case in this respect on a claim that mere transportation of goods by a carrier such as Western Union constitutes a 'handling' or 'working on' so as to make that carrier a producer. The contention, rather, is that Western Union employees, *prior to the introduction of the messages into interstate commerce*, 'work on' and 'handle' the messages. And that contention would seem to be justified by the facts."

Since handling and transporting goods after their completion do not constitute production, an elevator operator who serves a salesman may not be held to be "necessary" to production because sales contracts effected by him cause the transportation and transfer of goods—already manufactured—"from one person to another".

The court below confused engagement in commerce with production of goods for commerce

The Circuit Court of Appeals states that the exemption of retail establishments, the greater part of whose selling is in intrastate commerce,

> "would indicate that where the 'selling or servicing is in [interstate] commerce' the employees are to be included in the scope of the Act."

And that the Act

> "specifically excludes employees engaged in 'marketing' and 'distributing' of certain designated products. By implication, marketing and distributing of other products would seem to be included within the Act" (R. 343).

The answer is that the retailers' exemption was necessary, not because retailers might be considered to be

engaged in production of goods, but because they would, otherwise, be held to be engaged in interstate commerce itself.

So also with respect to the exemption covering the marketing and distribution of certain products; those exemptions were necessary because a distributor or marketer might, otherwise, be held to be engaged in commerce itself. Cf. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572.

Therefore, sales offices, while engaged in commerce, are not engaged in the production of goods for commerce. Thus, even if elevator operators and porters may be considered to have a sufficiently close tie with the sales activities carried on in this building so as to make their work necessary to such commerce they would not, because of that (assumed) fact, be covered by the Act. *McLeod* v. *Threlkeld*, 319 U. S. 491.

That was the conclusion reached by the Third and Fifth Circuits in *Blumenthal* v. *Girard Trust Co.*, 141 F. 2d 849, and *Johnson* v. *Dallas Downtown Dev. Co.*, 132 F. 2d 287, cert. den. 318 U. S. 790.

In the *Blumenthal* case a maintenance employee contended that he was necessary to production because of a tenant's receipt and shipment of automobile parts in interstate commerce. In dealing with this contention the court said:

> "Under the present facts the manufacture of the automotive parts had been concluded prior to the parts being received by the tenant at all. There was nothing he did with them, that rendered them any more complete or that was intended to be an operation necessary to their final development. He merely wrapped and mailed out the merchandise in exactly the same

condition as it was when turned over to him. He was in no way connected with the process of production of the automotive parts themselves."

And in the *Johnson* case, in which a number of the tenants were manufacturers' agents, sales representatives, etc., the Fifth Circuit held that the maintenance employees were not covered by the Act, saying:

"it is perfectly clear that neither Appellants nor any person with whom Appellants had any sort of contact or sustained any kind of relation was engaged in or about the building in the production of goods for commerce within the meaning of the Act" (p. 289).

Economic necessity, no criterion

The final basis for the Circuit Court's ruling on this subject is that selling is "economically necessary" to production.

But the same may be said of many of the activities which in this very case were held not to constitute production: legal services, building construction, engineering, financial activities, etc. Some of these could have been included had Congress made the Act applicable to all activities "affecting commerce" as was done in the case of the National Labor Relations and other Acts of Congress. But, as pointed out by this court, that phrase was rejected in favor of the narrower definition of production.

If Congress intended so broad a field of activity as selling to be included as production, it would and should have been more explicit.

Selling may be "economically necessary" to profits. It is not directly necessary to production itself.

POINT IV

The publicity and advertising tenants were not engaged in "production". Even if they were, respondents in maintaining the building in which said activities were housed did not have a sufficiently close tie to the tenants' advertising and publicity activities as to make them "necessary" thereto within the meaning of the Fair Labor Standards Act.

Neither the trial court nor the Circuit Court found that a substantial amount of publicity and advertising activities were carried on in the building herein. The Circuit Court described the activities of this group of tenants, which occupies 6.5% of the rentable area of the building, as follows:

> (5) Advertising agents and publicity and trade organizations which carry on publicity and advertising work using national publications, newspapers and radio. * * * The officers and employees of the trade organization are principally engaged in research and correspondence incidental to their operations. They also prepare circulars and in some cases weekly or monthly publications which are elsewhere printed and in most cases distributed from places other than the building herein.

The building involved in *Johnson* v. *Downtown Development Co.*, 132 F. 2d 287 (CCA 5th), cert. den. 318 U. S. 790, is similar to the one involved in this case, except that the Dallas building is much smaller. Among the thirty-one tenants occupying that building there were a number of sales agencies and, in addition, the following advertising and publicity firms:

> The Texas Daily Press League—an advertising organization—as a result of its efforts "mats and plates are sent by advertisers outside of Texas to newspapers located in Texas" (R. 18-19).

A non-profit trade association of newspapers which sends out "bulletins through the mail" and acts as a general clearing house for information and trade problems (R. 22-23).

An advertising agency which places advertising "outside of Texas for clients inside of Texas, including placing advertising in national magazines, arranging radio broadcasts and sending copies, mats, transcriptions, checks, contracts and correspondence * * * to points outside of Texas" (R. 27).

A branch of the International News Service, a press association, "engaged in furnishing news and feature material for newspapers with headquarters in New York City". This organization has a "teletype connection to points outside of Texas over which it receives and transmits news" (R. 27, 28).

Yet the Fifth Circuit held that neither the tenants nor the maintenance workers in that case "were engaged in the production of goods for commerce in or about the building" (p. 289 of 132 F. 2d).

Walling v. *Goldblatt Bros.*, 128 F. 2d 778 (CCA 7th), cert. den. 318 U. S. 757, dealt with the claims of warehouse and other employees of the defendant which operates ten department stores in Illinois and Indiana. The Seventh Circuit in that case held that some employees were covered by the Act and others were not, and that those workers who were engaged in "preparing * * * advertising copy are not subject to the Act" (p. 784 of 128 F. 2d).

If those preparing advertising copy are not engaged in the production of goods for commerce, *a fortiori*, building maintenance employees would not be engaged in production of goods for commerce by reason of their relationship with those who prepare the copy.

Even if this court were to hold that the tenants in this group were producers of goods for commerce, it cannot be said that the porters and elevator operators have a sufficiently close tie with the publicity, research and editorial work so as to be necessary to its production.

In *Lofther* v. *First Nat. Bank of Chicago*, 48 Fed. Supp. 692, 697, aff'd CCA 7th, 138 F. 2d 299, Judge Sullivan held that

> "reports, statements, and other written materials received by and emanating from the offices of banks and of the tenants"

constituted "goods" as defined by the Act. He said, however:

> "I am convinced that the janitors and elevator operators, by reason of their activities, are not so engaged in * * * the production of these goods for commerce, as to bring them under the provisions of the Act * * * *"

POINT V.

The Circuit Court erred in holding that if 20% of the tenants of an office building are engaged in production of goods for commerce, the building service employees of said building are covered by the Fair Labor Standards Act. But even under that test respondents are not covered by said Act.

Based upon the Wage & Hour Administrator's promulgation on November 19, 1943 (five years after the enactment of the statute under consideration) the Circuit Court of Appeals held that 20% was the standard "for determining whether a substantial portion of the building is devoted to production for interstate commerce" (R. 342).

The difficulty with this rigid mathematical test is illustrated by what the same court said in a succeeding case. *Fleming, et al.* v. *Post, etc.*, 146 F. 2d 441, December 14, 1944. After repeating its holding in this case respecting the percentage of tenants the Circuit Court said:

> "In deciding which of the occupants may be considered as engaged in the production of goods for interstate commerce, where any of them is so engaged but also in production for intrastate commerce, we are again faced with the necessity of discovering a quantitative standard. On this question we have no interpretation by the Administrator to assist us. The Supreme Court has indicated only that the tenants must be 'substantially' engaged in the production of goods for interstate commerce. Walton v. Southern Package Corp., 320 U. S. 540. Once again we equate the term 'substantial' with the figure of 20%. We fully appreciate that under these criteria it is possible (although not so in this case) for building employees to be brought under the Act when but 4% of the activity of all the tenants may be categorized as production of goods for interstate commerce. But we feel that the decisions of the Supreme Court indicate such a result, and we must follow what seem to us the implications of these decisions; 'we are merely a reflector, serving as a judicial moon'."

Upon further analysis the 4% figure may be further reduced by reason of the fact that only a fraction of a tenant's activities may constitute production.

For example, Cherokee Spinning Co., which occupies 770 sq. ft. (R. 137) in the building herein (not included in the list of ten tenants who use their space exclusively for selling), uses its office mainly to "sell our merchandise, which is practically all of the products of the mill" (R. 138). However, one of the four employees, its telephone operator, sketches (on paper) designs for handkerchiefs "when she is not busy at the switchboard" (R. 142-143).

Assuming that such tenants were held to be engaged in production, a building could be held to be devoted to production of goods for commerce because 20% of its tenants devote 20% of their activities to the production of goods, 20% of which is distributed in interstate commerce. The net percent of production in interstate commerce could then, at least theoretically, be reduced to .8% of the total activities of the building.

It would seem, therefore, that the mathematical test applied by the Circuit Court, in this and the *Fleming* cases, is unrealistic and improper and that the test of substantiality should be fixed in a manner more reasonable and not nearly so rigid.

The office building herein is not devoted to production to the extent of 20%

What has been said respecting the rigidity and unreasonableness of the 20% test is not to be construed to mean that if that test is a correct one the building herein is devoted to production.

The decision of this court in *Western Union Telegraph Co.* v. *Lenroot,* supra, clearly demonstrates the incorrectness of the lower court's ruling that the selling activities of 27 tenants constitutes production. These tenants, 10 among the manufacturing and mining tenants and 17 sales agents, occupy approximately 23% of the rented area of the building.

We have demonstrated that employees of manufacturing and mining companies, which produce nothing in the office building herein, are not engaged in production.

Thus, even if the publicity concerns, occupying 6.5% of the rentable area and if the six among the manufacturing and mining tenants occupying 5.1% of the rentable area of the building, who carry on some executive and admin-

istrative activities, were held to be engaged in the production of goods and the work of the respondents necessary thereto, the total space thus used would be less than 12% of the rentable area of the building (pp. 7-9, supra).

CONCLUSION

The judgment of the Circuit Court of Appeals for the Second Circuit should be reversed.

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